SUPREME COURT, U. S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 532

E. B. WELCH,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

HUGH B. MILLER,
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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled matter on April 21, 1967. A petition for rehearing by this petitioner was denied on May 26, 1967.

CITATIONS TO OPINIONS BELOW

The findings and judgment of the District Court for the Northern District of California are not re-

ported. They are printed in Appendix "A" hereto, *infra,* pp. i-x, and may be found in the record at R. I, 41-50.[1]

The opinion of the Court of Appeals for the Ninth Circuit (R. I, 64-69) is printed in Appendix "B" hereto, *infra,* p. xi, and is reported at 377 F. 2d 501.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 21, 1967 (R. I, 70) and is printed in Appendix "B" hereto, *infra,* p. xx. A petition for rehearing was filed by this petitioner on May 19, 1967 and was denied on May 26, 1967. (R. I, 71.) The order denying a rehearing is printed in Appendix "B" hereto, *infra,* p. xx. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTES AND RULES INVOLVED

Petitioner proceeds under the General Maritime Law of the United States as set forth in the United States Constitution, Article III, Section 2. In addition, the Jones Act (46 U.S.C. § 688, et seq.) is also involved.

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[1]The record in this case consists of 3 volumes and various exhibits as certified and transmitted by the Court of Appeals. References to the numbered volumes are by volume and page, e.g. (R. I, 17). Two depositions, those of Pak and Goodheim, were introduced into evidence at the trial without reading them in open court and are referred to by deponent and page, e.g. (Pak 33). All other exhibits are referred to by their original designations, e.g. (Resp. Exh. B).

STATEMENT

The facts are as stated in the opinion of the Court of Appeals, except that no help or assistance was available to aid petitioner had he requested help in connection with the assigned task.[2] The following facts from the opinion of the Court of Appeals are a necessary predicate in considering this petition.

A standby lube oil pump on board respondent's ship was not operating properly. Petitioner, the ship's Third Assistant Engineer, was ordered by his superior officer (the First Assistant Engineer) to dismantle the pump and make the necessary repairs. Repairing the pump required removing its two pistons and cross-head and transporting these parts from the lower engine room up a ladder a considerable distance to the ship's machine shop. Each piston weighed over 100 lbs.; the cross-head weighed 42 lbs. The operation of dismantling the pump and carrying each piston and the cross-head to the machine shop is a two man job. One of the ship's oilers had been initially assigned to help petitioner with dismantling the pump on the morning of the date of the accident. However, at noon his watch was finished and the oiler left the job. After lunch petitioner returned to the work. He was not provided with a substitute helper and was left to transport the parts from the pump to

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[2]The fact that there was no help or assistance available to aid petitioner was pointed out in his briefs to the Court below, where *all* the evidence on this issue with record references was set forth verbatim; the lack of available help and the reasons therefore was again pointed out in the Seaman's petition for rehearing. (See: Appendix "C", *infra*, pp. xxi-xxvi).

the machine shop unassisted and to complete the job alone.

There was in fact no help (men) available or at hand to aid petitioner in the ordered task.[2] After transporting each of the pistons up to the machine shop and back down to the disabled pump, petitioner sustained permanent injury to his spine in the course of lifting and carrying the cross-head from the pump to the machine shop unassisted.

The District Court, sitting in admiralty, found respondent's vessel unseaworthy by reason of respondent's failure to provide petitioner with sufficient men (the additional man along with petitioner) to perform the required task.[3] The District Judge found and assessed damages in the total sum of $38,450.00 as a direct result of the unseaworthiness of the ship.

But the District Court also found petitioner guilty of contributory negligence on the sole basis of his failure to request additional help of his superiors to aid him in the assigned task and determined that petitioner's negligence in that regard contributed fifty (50%) percent to the accident and the consequences to him. The District Court then divided damages by fifty (50%) percent and awarded petitioner one-half the amount of the total damages assessed.

Each party appealed the decision of the District Court. The Court of Appeals affirmed the judgment of the District Court. Petitions by both parties for

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[3]See: *Waldron v. Moore-McCormack Lines, Inc.* (1967) 386 U.S. 724, 87 S.Ct. 1410, 18 L.ed.2d 482; *American President Lines, Ltd. v. Redfern* (9th Cir., 1965) 345 F.2d 629.

a rehearing in the Court of Appeals were denied on May 26, 1967.

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals with regard to the issue of contributory fault alone.

QUESTIONS PRESENTED

1. Whether the District Court clearly erred in finding the petitioner-seaman guilty of contributory negligence on the sole basis of his failure to request additional help, when his superior aboard ship ordered him to do a two-man job and the respondent-employer failed to supply him with the extra man resulting in injury to the seaman when acting in obedience to his orders while performing the assigned task alone.

Alternative Statement of Question No. 1

Given:

(a) A two-man job aboard ship.

(b) The shipowner's absolute, continuing and non-delegable duty under maritime law to provide the necessary wherewithall for the assigned task.

(c) The seaman's absolute and continuing duty to promptly obey all lawful orders of his superior officers aboard ship.

Question: Does obedience to orders of a superior officer constitute contributory negligence on the part of a seaman, where the shipowner

fails to continuously provide the extra man for a two-man job and the seaman, in obedience to orders and without complaint or request for additional help, is injured while working unassisted on the ordered task.

2. Whether the District Court clearly erred in finding the petitioner-seaman guilty of contributory negligence on the sole basis of his failure to request additional help **(no help or assistance in fact being available or at hand)**, when his superior aboard ship ordered him to do a two-man job, and the respondent-employer failed to supply him with the extra man, resulting in injury to the seaman when acting in obedience to his orders while performing the assigned task alone.

Alternative Statement of Question No. 2

Whether negligence on the part of an injured seaman must contribute directly to the occurrence of an accident before the rules of comparative negligence and divided damages are applied in maritime cases?

3. Do the rules of comparative fault and divided damages apply where liability for personal injuries to a seaman is based on the shipowner's breach of the warranty of seaworthiness?

Alternative Statement of Question No. 3

Whether the defense of contributory negligence is properly available to reduce a seaman's damages caused by unseaworthiness?

REASONS FOR GRANTING A WRIT

1. The decision of the Court of Appeals for the Ninth Circuit (Appendix "B," *infra,* p. xi) is in conflict with the decision of the Fifth Circuit Court of Appeals in *Cox v. Esso Shipping Co.* (5th Cir. 1957) 247 F. 2d 629. It also conflicts with the decision of this Court in *Michalic v. Cleveland Tankers, Inc.* (1960) 364 U.S. 325, 81 S. Ct. 6, 5 L. Ed. 2d 20.

In *Cox, supra,* as here, where the seaman was acting in obedience to orders (and the wherewithall to carry out the orders was not supplied by the shipowner), it was held that the shipowner's dereliction of duty cannot be turned into a fault on the part of the seaman under the guise of contributory negligence. Similarly this Court, in quoting from the *Cox* case in *Michalic, supra,* affirmed the proposition that dereliction of duty on the part of the shipowner, where the injured seaman is acting under orders of his superior, cannot be turned into a fault on the part of the seaman under the guise of contributory fault.

This decision of the Ninth Circuit Court of Appeals, if allowed to stand, is in direct conflict with *Michalic* and *Cox, supra,* and is also contrary to the policy of the federal law in seamen's cases. Where a seaman is acting in obedience to orders of his supe-

rior and there is no safe alternative provided by the shipowner, he cannot be guilty of contributory negligence in performing the ordered task with the wherewithall furnished him at hand. The seaman has no choice but to obey all lawful orders of his superiors aboard his ship.

The decision of the Court of Appeals for the Ninth Circuit is also in conflict with two decisions of the Fourth Circuit Court of Appeals in *Ballwanz v. Isthmian Lines, Inc.* (4th Cir. 1963) 319 F. 2d 457 and *Smith v. United States* (4th Cir. 1964) 336 F. 2d 165.

In *Ballwanz, supra,* it was held reversible error for the trial judge to have instructed the jurors that they might take into consideration the plaintiff's failure to complain or to demand additional material to make the equipment better suited for the purpose for which it was being used (319 F. 2d 457, at 461-462). There, as here, there was no duty and hence no contributory negligence on the part of the injured seaman who failed to request help or seek out the wherewithall to perform the designated task.

In *Smith, supra,* the Fourth Circuit Court of Appeals held (a) that it was the duty of the shipowner to provide the wherewithall in connection with an assigned task; (b) any attempt to shift this duty to the injured workman under the guise of contributory negligence is contrary to the maritime law; and further, (c) that actual knowledge of the defective condition by the injured workman where no safe alternative is shown, does not justify a finding of contribu-

tory negligence against him, for such a finding would be tantamount to holding that he assumed the risk of the defective condition and "he may not be charged with 'assumption of the risk under another name' ".[4]

In the instant case the failure of petitioner to request help—where no help was in fact available—cannot be the predicate for a finding of contributory negligence not only on the ground of lack of causal connection between petitioner's omission and the occurrence of the accident, but also because it would be tantamount to holding that petitioner assumed the risk created by his employer's dereliction of duty, where no safe alternative was provided him by his employer.[5]

2. The decision of the Court of Appeals for the Ninth Circuit (Appendix "B," *infra,* p. xi) is in conflict with the decision of the Third Circuit Court of Appeals in *Sizemore v. United States Lines Co.* (3rd Cir., 1963), 323 F. 2d 774, affirming 213 F. Supp. 76, 81-83 (E.D. Pa., 1962).

In *Sizemore, supra,* as here, the suit involved injury to a merchant seaman aboard his ship where the claim was based on unseaworthiness. The trial judge held that before the rules of comparative negligence and divided damages could apply, the shipowner was bur-

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[4]See: *Palermo v. Luckenbach Steamship Co.,* 355 U.S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3 (1957);
Socony Vacuum Oil Co. v. Smith, 305 U.S. 424, 432, 59 S. Ct. 262, 83 L. Ed. 265 (1939).

[5]See: *San Pedro Compania Armadoras, S.A. v. Yannacopoulos,* 357 F. 2d 737 (5th Cir., 1966).

dened to show direct causal connection between the conduct of the injured seaman and the resultant accident. In *Sizemore, supra,* the Court of Appeals for the Third Circuit affirmed, upholding the view of the trial judge that at least a direct and substantial connection between the injured worker's dereliction and the resultant accident must be shown by the employer before the employee's negligence can be held to be contributory and his damages reduced.

> ". . . A review of the common law indicates that the plaintiff's act or omission must at least *contribute directly* to his harm in order to constitute contributory negligence." (213 F. Supp. at p. 83.) (Emphasis supplied.)

The Ninth Circuit Court of Appeals appears to have blurred, if not destroyed, this distinction in its opinion. Where, as here, help was not shown to be available,[6] the dereliction of duty on the injured worker's part (omission to request additional help) was not causally connected to the occurrence as a matter of law.

3. The decision of the Ninth Circuit Court of Appeals (Appendix "B," *infra,* p. xi) is in conflict with the decisions of the Courts of Appeals for both the Third Circuit and the Fifth Circuit in recent breach of warranty decisions arising out of the cigarette-cancer cases which hold that a plea of contributory

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[6]On this issue, the burden of proof was clearly on respondent and not petitioner. See: *Mason v. Mathieson Tanker Industries, Inc.*, 298 F. 2d 28 (4th Cir.), cert. denied 371 U.S. 828, 83 S. Ct. 23, 9 L. Ed. 2d 66 (1962).

negligence is obviously inapplicable to a claim based on breach of implied warranty.

See: *Pritchard v. Liggett & Meyers Tobacco Co.* (3rd Cir., 1965) 350 F. 2d 479, *modified* 370 F. 2d 95;

Green v. American Tobacco Co., 325 F. 2d 673 (5th Cir., 1963).

Breach of the warranty of seaworthiness should be treated as breach of any other warranty. The Court of Appeals for the Ninth Circuit has confused a tort concept (contributory negligence) with a doctrine *ex contractu* in nature (Cf: *The Osceola*, 189 U.S. 158 (1903)). The very definition of the duty to provide a seaworthy ship precludes the application of contributory negligence where injury is caused by unseaworthiness.

4. The questions presented are of cardinal importance in maritime cases and of far reaching importance in the law of the employer-employee relationship, in that the decision of the Ninth Circuit Court of Appeals is believed to be erroneous and conflicting with the common law applicable to the relationship of master and servant ashore.

The rule at common law in the employer-employee relationship holds that the employee who is given direct orders by his superior must obey—unless there is obvious and imminent peril to life or limb. Indeed, the applicable common law rule was set forth as follows in an earlier decision of the Court of Appeals for the Ninth Circuit:

See: *Atchison, T. & S. Fe Ry. Co. v. Seamas* (9th Cir., 1952) 201 F. 2d 140 at p. 144:

> "The long-settled common law rule is that where an employee acts in obedience to a direct order of his principal or a vice-principal, he is not negligent unless the danger is so glaring and imminent that no reasonable person would incur it, even under orders. Even knowledge and appreciation of the danger will not be sufficient to charge the servant with negligence when acting in obedience to a direct command unless he not only knows what is the risk to be encountered, but also that it will probably be attended with injury which he cannot void by the exercise of care and caution."

The common law rule is based upon the very nature of the principal-agent relationship and distinguishes the principal from the agent. The agent must obey the orders of his principal unless there is an all-compelling justification for non-compliance. Obedience to lawful orders of his superiors does not constitute contributory negligence on the part of the employee or assumption of risk of injury at common law.

Most accidents aboard ship occur when the seaman is acting under orders of a superior officer. If this decision of the Ninth Circuit Court of Appeals is permitted to stand, not only can it be used as a back-door device to saddle the injured seaman with the burden of fault under the "guise of contributory negligence", or more precisely compel the workman to assume the risk of harm from unseaworthy work-

ing conditions[7] (contrary to the public policy underlying both the Jones Act (46 U.S.C. § 688) and the General Maritime Law), but a harsher rule than that which exists at common law would be applied to seamen. In this regard, the decision of the Court below is believed to be erroneous and conflicting with decisions of this Court in *Socony Vacuum Oil Co. v. Smith* (1939) 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265, and with the Ninth Circuit's own decision in *Hudson Waterways Corporation v. Schneider* (9th Cir., 1966) 365 F. 2d 1012, holding that within reasonable limits the policy of the law favors merchant seamen and that the Court should not follow harsh common law principles regarding liability or contributory fault.

The situation presented in the instant case is clearly analogous to *Hudson Waterways Corporation, supra,* and *Socony Vacuum Oil Co., supra,* yet the Court of Appeals for the Ninth Circuit apparently has determined to frustrate furtherance of this policy by requiring a measure of conduct on the part of an injured seaman far greater than that required under common law.

The decision of the Court of Appeals for the Ninth Circuit on the issue of contributory negligence in this case should be reversed as contrary to the expressed policy of the Congress and the Courts in maritime cases most recently recognized by this Court, in

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[7]Cf: *Darlington v. National Bulk Carriers* (2nd Cir. 1946) 157 F. 2d 817.

Waldron v. Moore-McCormack Lines, Inc. (1967), 386 U.S. 724, 87 S. Ct. 1410, 18 L. Ed. 2d 482.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
August 21, 1967.

Respectfully submitted,
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EUGENE A. BRODSKY,
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Counsel for Petitioner.

(Appendices A, B and C Follow)

Appendix A

A

[Title of Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a seaman's action in admiralty for damages for personal injuries. The issues of maintenance and cure are not embraced within the pleadings. Therefore, they are not included herein. On the pleadings and the evidence, the Court hereby makes the following findings of fact:

FINDINGS OF FACTS

1. Libelant is E. B. Welch, a merchant seaman, now sixty-three years of age and a resident of the City and County of San Francisco, State of California. He has been a licensed Marine Engineer for over twenty years and has a high school education. Mr. Welch holds a Third Assistant Engineer's license for diesel vessels and a Chief Engineer's license for steam vessels.

2. Respondent is American President Lines, Ltd., a corporation, which has a principal place of business in the City and County of San Francisco, State of California.

3. Respondent owned, operated, managed, navigated, maintained and controlled the United States vessel, the SS. PRESIDENT ROOSEVELT, at all times mentioned herein.

4. From April, 1962 to the latter part of February, 1964, Libelant was employed by Respondent aboard the SS. President Roosevelt as a Third Assistant Engineer. He served aboard said vessel on a series of voyages from San Francisco to the Far East and return to San Francisco. Libelant's immediate superior officers in the Engine Department of said vessel, at the time of his injuries in this case, were the Chief Engineer, Mr. Smith, the First Assistant Engineer, Mr. Pak, and the Second Assistant Engineer, Mr. Goodheim.

5. The accident to Libelant occurred in the early afternoon of February 19, 1964 on board the Respondent's vessel which was then in navigable waters at the Port of Los Angeles, California. On the previous day, during the trip from San Francisco to Los Angeles, the ship's standby steam oil lube service pump located in the forward, lower Engine Room, was found to be pounding and not functioning properly, and on the morning of February 19, 1964, the Libelant, on orders of his superior officer, the First Assistant Engineer, commenced to dismantle this pump and make the necessary repairs since the ship could not safely go to sea unless this standby pump was in operating condition. These repairs necessitated the removal of the pistons and crosshead from the pump and required that these parts be carried up from the pump's location in the forward Engine Room to the ship's Machine Shop. In carrying each of these parts from the pump to the Machine Shop, it is necessary to go up one fairly steep ladder, about ten or twelve steps in

the forward Engine Room, then over a coaming of six to eight inches through a watertight door, and across an auxiliary machine space about twenty-five feet; from there it is necessary to go up another short ladder about four steps and then over a six or eight inch coaming of another watertight door and proceed about ten more feet to reach the Machine Shop space. Each of the two pistons contained in this pump and the crosshead (a metal casting which separates the pistons in the pump) are of considerable weight.

6. The job of dismantling this particular pump and carrying its parts to the ship's Machine Shop for repair was rated aboard Respondent's vessel as a two-man job. One of the ship's oilers had, in fact, been assigned to help Libelant with dismantling the pump on the morning of the date of the accident, but the oiler's time was up at noon and he went off duty. Libelant was not provided with a substitute helper and he was left to transport the parts from the pump to the Machine Shop and complete the job alone.

7. In the early afternoon of said date, Libelant proceeded to lift and carry each of the pistons from their location near the pump up to the Machine Shop where he checked them over and then he carried each piston back down from the Shop to the pump. Libelant also lifted and carried the crosshead from the pump up the ladder and over the coaming of the watertight door leading toward the Machine Shop and felt a "pop" in his back. He set the crosshead down and was unable to finish the job. He immediately reported his condition to his superior officers who re-

lieved him from further duty. Libelant sustained injuries to his back and spine in the course of lifting and carrying the crosshead from the pump to the Machine Shop aboard the vessel unassisted on the early afternoon of February 19, 1964.

8. The failure of Respondent, on the afternoon of February 19, 1964, to provide Libelant with sufficient men, specifically an additional man along with Libelant, to perform the required task of dismantling the ship's standby steam oil lube service pump and transporting its parts from the pump to the ship's Machine Shop for repair rendered Respondent's vessel, the SS. President Roosevelt, unseaworthy in that regard.

9. Libelant sustained severe, painful and permanent injuries and damages as a direct and proximate result of the aforesaid unseaworthiness of said vessel.

10. Libelant's injuries sustained in the accident aboard Respondent's ship on February 19, 1964 consisted of a lateral compression fracture of the body of his third lumbar vertebra with nerve root compression and irritation at that level of his spine, causing him much pain and resulting in weakness and atrophy of the musculature of his right leg. In addition, Libelant had a prior non-disabling and asymptomatic arthritic condition of his lumbar spine which was painfully aggravated and made symptomatic as a result of the injuries he sustained at work on February 19, 1964 aboard Respondent's ship.

11. Libelant received initial medical care and treatment for his injuries from the ship's doctor, and

he was placed under medication for severe pain until the vessel reached Honolulu on February 25, 1964. Libelant was there referred to the Public Health Service where he was examined and found to have an acute spinal injury and was repatriated by air to the United States Public Health Service Hospital facility at San Francisco for further care. The fractured vertebra was confirmed by X-ray and examination disclosed a nerve root compression in the lumbar spine, evidenced by painful limitation of back motion and weakness, atrophy, loss of sensation and impairment of the knee reflex in the right leg. Libelant was treated with pelvic traction, bed rest and medication at the San Francisco facility of the Public Health Service Hospital for about eighteen days. Thereafter he was continued as an out-patient at said hospital facility on a regimen of rest and limited activity with prescribed exercises and further medication for pain. Disability involving the back and the right leg persisted and Libelant was made permanently unfit for sea duty by the doctors at the United States Public Health Service Hospital on October 5, 1964. Libelant was treated thereafter at regular intervals as an out-patient at said hospital and also by a private physician, but there has been no change in his condition. Libelant's disabilities occasioned by the accident of February 19, 1964 consist of painful restriction of his back motion and weakness, atrophy and pain in his right leg. By reason of these disabilities, Libelant cannot engage in work requiring heavy lifting, prolonged standing, squatting or requiring the climbing of ladders or repetitive use of his right leg.

12. Since the accident, in an effort to keep working, Libelant has created a job for himself by the purchase of a jitney bus, and since April, 1965, has been operating said vehicle in San Francisco. He is able to work at his own pace and rest on the job since he is his own boss. He has averaged about $200 net per month at this endeavor.

13. Libelant has a life expectancy of 13.8 years.

14. Libelant was earning and was capable of earning Ten Thousand Five Hundred Dollars ($10,500) per year at the time of his accident aboard the SS. President Roosevelt.

15. Libelant sustained an actual loss of earnings and benefits as a result of said accident (with credit given for payment of unearned wages and credit given for actual earnings as a jitney operator) in the sum of Sixteen Thousand Two Hundred Dollars ($16,200).

16. As a direct and proximate result of said accident, Libelant has sustained damages for past pain and suffering in the sum of Five Thousand Dollars ($5,000).

17. As a direct and proximate result of said accident, Libelant has also sustained a permanent partial impairment of his earning capacity with a loss of future earnings. With respect to future earning capacity and by reason of Libelant's prior medical history including the arthritic condition of his back, it is reasonably probable that he could have worked an additional two and one-half years in his usual employment from and after age sixty-three. Accordingly, the

Court finds that Libelant has suffered damages for loss of future earnings in the sum of Fifteen Thousand Seven Hundred Fifty Dollars ($15,750) based upon a partial loss of earning capacity on total annual earning power of Ten Thousand Five Hundred Dollars ($10,500) per year for Libelant's work expectancy of 2.5 years, discounted to present value at 3.5% per annum.

18. With regard to future pain, suffering and discomfort as a result of said accident, Libelant has suffered damages in the additional sum of One Thousand Five Hundred Dollars ($1,500).

19. Libelant has sustained damages in the total sum of Thirty-Eight Thousand Four Hundred Fifty Dollars ($38,450) as a direct and proximate result of the accident suffered by him aboard the SS. President Roosevelt on February 19, 1964.

20. Libelant was guilty of contributory negligence for his failure to request additional help of his superiors to aid him in his assigned task on the afternoon of February 19, 1964. Libelant's own negligence, as aforesaid, contributed fifty per cent (50%) to the accident and the consequences to him.

21. After deducting for Libelant's contributory fault the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225), which represents fifty per cent (50%) of Libelant's total damages, the total amount recoverable by Libelant from the Respondent in this case is the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and of the parties.

2. Libelant's injuries and damages were proximately caused by the unseaworthiness of the Respondent's vessel, the SS. President Roosevelt, on the afternoon of February 19, 1964. See *American President Lines, Ltd. v. Redfern* (9 CCA 1965), 345 F. 2d 629; also *June T., Inc. v. King,* 290 F. 2d 404.

3. Libelant sustained total damages, before deduction for his own contributory negligence, in the sum of Thirty-Eight Thousand Four Hundred Fifty Dollars ($38,450) as a direct and proximate result of the accident on board Respondent's ship, the SS. President Roosevelt, on the afternoon of February 19, 1964.

4. Libelant's own negligence contributed fifty per cent (50%) to the accident and consequences to Libelant.

5. Libelant is entitled to a Judgment and Final Decree for damages for personal injuries in his favor and against American President Lines, Ltd., a corporation, in the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225), plus costs of suit, and with interest at the legal rate of seven per cent (7%) per annum from November 24, 1965.

Dated: November 24, 1965.

Bruce R. Thompson
United States District Judge

B

[Title of Court and Cause]

FINAL DECREE

The above entitled cause came on regularly for trial on November 1, 1965, in the above entitled Court before The Honorable Bruce R. Thompson, United States District Judge, sitting in Admiralty, the parties appearing in person or by their respective proctors; Messrs. Jarvis, Miller & Stender and Martin J. Jarvis, Esquire, appearing as proctors for the Libelant, E. B. Wech, and Messrs, Lillick, Geary, Wheat, Adams & Charles and Frederick W. Wentker, Jr., Esquire, appearing as proctors for Respondent, American President Lines, Ltd.. The trial in the action commenced on the 1st day of November, 1965 and concluded on the 2nd day of November, 1965, and oral and documentary evidence having been introduced on behalf of the respective parties, and the Court having fully considered the facts and the law and the arguments of counsel, and having been fully advised, and the cause having been submitted for decision, the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and good cause appearing therefor,

Now, Therefore, by reason of the law and the Findings of Fact aforesaid, It Is Ordered, Adjudged and Decreed:

That the Libelant, E. B. Welch, do have and recover of and from the Respondent, American President Lines, Ltd., a corporation, damages for personal

injuries in the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225), lawful money of the United States of America, with interest thereon at the rate of seven per cent (7%) per annum from November 24, 1965 until paid, together with Libelant's costs incurred in this action amounting to the sum of $175.59, and that Libelant have execution therefor against Respondent unless this decree be satisfied within ten (10) days after entry of this decree and service of a copy of this decree on Respondent or its proctors.

Dated: November 24, 1965.

Bruce R. Thompson
United States District Judge

Original Filed November 26, 1965
Clerk, U. S. Dist. Court

Appendix B

United States Court of Appeals
for the Ninth Circuit

American President Lines, Ltd.,
a corporation,
Appellant and Cross-Appellee,
vs.
E. B. Welch,
Appellee and Cross-Appellant.

No. 21,016

[April 21, 1967]

On Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: HAMLEY, HAMLIN and DUNIWAY,
Circuit Judges

HAMLIN, Circuit Judge:

E. B. Welch, appellee herein, filed an action in the United States District Court for the Northern District of California, Southern Division, against American President Lines, Ltd., appellant herein, seeking damages for injuries received while he was a seaman aboard the SS PRESIDENT ROOSEVELT, a vessel owned by appellant. Appellee alleged that his injuries were proximately caused by the unseaworthi-

ness of appellant's vessel in that appellant did not supply appellee "sufficient personnel or assistance necessary for the performance of his said duties aboard said vessel." The district court, without a jury, found for appellee holding that his damages amounted to $38,450, and that his own negligence contributed 50 per cent to the accident. Judgment was entered against appellant in the sum of $19,225.00. Appellant appeals from the finding of unseaworthiness, and appellee cross-appeals from the finding of contributory negligence.

Appellee is a merchant seaman holding a third assistant engineer's license for diesel vessels and a chief engineer's license for steam vessels. From April, 1962, to the latter part of February, 1964, he was employed as a third assistant engineer aboard the SS PRESIDENT ROOSEVELT.

On February 18, 1964, while the vessel was enroute from San Francisco to Los Angeles, it was discovered that the standby lube oil pump in the lower engine room was not operating properly. This pump cuts in service if the main lube oil pump fails and must function properly before the ship can safely proceed to sea. On the morning of February 19, 1964, when the vessel was in Los Angeles Harbor, the first assistant engineer, appellee's superior officer, instructed appellee to dismantle the pump and make the necessary repairs. Repairing the pump required removing its two pistons and crosshead and carrying them from the lower engine room to the ship's machine shop. Each part would have to be carried from the lower engine room

up a ladder of approximately ten steps, over a six or eight-inch coaming, then along approximately 25 feet past a storekeeper's door, then up three or four steps and over another coaming six or eight inches high, and then approximately ten feet more into the machine shop. The testimony was that the operation of dismantling the pump and carrying each piston and the crosshead to the machine shop is a two-man job. There was no contrary testimony upon this issue. Each piston weighs in excess of a hundred pounds. There was testimony estimating the weight of the crosshead at over a hundred pounds, but during the trial appellant produced evidence showing that it weighed forty-two pounds.

During the morning work in dismantling the pump an oiler was assigned to assist appellee. However, at noon his watch was finished and he left the job. When the oiler left, the pistons and the crosshead had been removed from the pump but were still in the lower engine room. After lunch appellee returned to the work alone. He first carried one piston from the lower engine room to the machine shop over the route above described, taking it up the ladder one step at a time. When the piston reached the machine shop it was examined and returned to the lower engine room over the same route. Appellee then took the second piston and carried it up in the same way to the machine shop where it too was checked. He then took this piston back again to the lower engine room. Appellee testified that after this his back felt tight and "it was a pretty heavy lift." Appellee then testified that he took the

crosshead up toward the machine shop and on the way he heard a slight "pop" in his lower back. He did not feel any immediate pain, and after putting the crosshead down for a few moments, he "kind of straightened" himself out and picked up the crosshead, and continued to the machine shop. In the machine shop he did certain work upon the crosshead.

He left the crosshead in the machine shop for further repair and went back to the engine room. His back was beginning to pain him at that time and he reported that fact to his superior, the second engineer. After resting for a while he went up to his quarters. About four o'clock he reported his condition to the first engineer and was told to knock off for the rest of the day. The ship sailed the next day for Honolulu, and appellee stayed in his bed during the trip. He testified that he was suffering pain in his right hip and right leg. He was given medical attention by the ship's doctor during the trip. In Honolulu appellee received further medical and hospital care, and was certified as unfit for duty. Transportation was arranged for him to fly to San Francisco where he received medical attention at the Public Health Service Marine Hospital. He remained in the hospital for 17 or 18 days and was in traction. Upon discharge he received out-patient care and was finally declared permanently unfit for sea duty in October, 1964. He remained in that status up until the time of trial.

The injuries received by appellee on February 19, 1964, were diagnosed as "a lateral compression fracture of the body of his third lumbar vertebra with

nerve root compression and irritation at that level of his spine, causing him much pain and resulting weakness and atrophy of the musculature of his right leg."

Among others, the district judge made the following findings:

> 6. The job of dismantling this particular pump and carrying its parts to the ship's Machine Shop for repair was rated aboard Respondent's vessel as a two-man job. One of the ship's oilers had, in fact, been assigned to help Libelant with dismantling the pump on the morning of the date of the accident, but the oiler's time was up at noon and he went off duty. Libelant was not provided with a substitute helper and he was left to transport the parts from the pump to the Machine Shop and complete the job alone.
>
> 7. In the early afternoon of said date, Libelant proceeded to lift and carry each of the pistons from their location near the pump up to the Machine Shop where he checked them over and then he carried each piston back down from the Shop to the pump. Libelant also lifted and carried the crosshead from the pump up the ladder and over the coaming of the watertight door leading toward the Machine Shop and felt a "pop" in his back. He set the crosshead down and was unable to finish the job. He immediately reported his condition to his superior officers who relieved him from further duty. Libelant sustained injuries to his back and spine in the course of lifting and carrying the crosshead from the pump

to the Machine Shop aboard the vessel unassisted on the early afternoon of February 19, 1964.

8. The failure of Respondent, on the afternoon of February 19, 1964, to provide Libelant with sufficient men, specifically an additional man along with Libelant, to perform the required task of dismantling the ship's standby steam oil lube service pump and transporting its parts from the pump to the ship's Machine Shop for repair rendered Respondent's vessel, the SS. President Roosevelt, unseaworthy in that regard.

9. Libelant sustained severe, painful and permanent injuries and damages as a direct and proximate result of the aforesaid unseaworthiness of said vessel.

* * * * * * *

19. Libelant has sustained damages in the total sum of Thirty-Eight Thousand Four Hundred Fifty Dollars ($38,450) as a direct and proximate result of the accident suffered by him aboard the SS President Roosevelt on February 19, 1964.

20. Libelant was guilty of contributory negligence for his failure to request additional help of his superiors to aid him in his assigned task on the afternoon of February 19, 1964. Libelant's own negligence, as aforesaid, contributed fifty per cent (50%) to the accident and the consequences to him.

21. After deducting for Libelant's contributory fault the sum of Nineteen Thousand Two

Hundred Twenty-Five Dollars ($19,225), which represents fifty per cent (50%) of Libelant's total damages, the total amount recoverable by Libelant from the respondent in this case is the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225).

Appellant makes the following specifications of errors:

1. The District Court's Finding No. 6 is clearly erroneous to the extent that it states that carrying the crosshead in this case was rated as a two-man job, since there was no evidence that the carrying of such a 42-pound crosshead was a two-man job.

2. The District Court erred in finding and holding (Finding No. 8: Conclusion No. 2) that the vessel was unseaworthy because it failed to provide two men to carry the 42-pound crosshead, since the carrying of such an object by one man was within usual and customary standards and the warranty of seaworthiness with respect to crew requires that the vessel be adequately manned overall but not that a particular number of men be assigned to perform each task aboard.

The contention as to Specification No. 1 is quickly answered. There is ample testimony in the record not only that the work of dismantling and repairing this pump was a two-man job but there was also testimony that the carrying of each piston and of the crosshead was a two-man job. Appellant produced no witness to testify to the contrary.

The owner of a vessel has an absolute and nondelegable duty to provide a seaworthy ship. Mahnich v. Southern S.S. Co., 321 U.S. 96; Hudson Waterways Corp. v. Schneider, 365 F.2d 1012, 1014 (9th Cir. 1966). Not only must the things about a ship be reasonably fit for the purpose for which they are to be used, Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, but the ship must be properly manned. "[T]o be inadequately or improperly manned is a classic case of an unseaworthy vessel. See Boudoin v. Lykes Bros. S.S. Co., Inc., 1955, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354, 1955 A.M.C. 488." June T., Inc. v. King, 290 F.2d 404, 407 (5th Cir. 1961).

Appellant asserts that they are obligated to provide an adequate overall crew but not an adequate number of men for each task on the vessel. American President Lines, Ltd. v. Redfern, 345 F.2d 629 (9th Cir. 1965) is to the contrary and is controlling. In that case the watch officer ordered Redfern to "go down and change from high suction to low suction," an operation that required opening the gate valves located on either side of the vessel and closing a corresponding pair of valves at a higher level. He attempted to open one of the valves by turning its 30-inch diameter wheel but it was stuck. On the third attempt to turn the wheel he injured his back. This court held:

> "A stuck sea valve, the trial judge found—and the finding is supported by substantial evidence—is suitable only if operated by two men; otherwise, it constitutes a dangerous condition. . . .

> In this setting, we are satisfied that the court was justified in determining that the HOOVER was not reasonably fit for service because she was improperly manned—'a classic case of an unseaworthy vessel.'"

In the present case repairing the lube pump was a two-man job and it was dangerous for one man to proceed alone. We hold that the SS PRESIDENT ROOSEVELT was improperly manned when appellee repaired the lube pump without being supplied with adequate help.

Appellee has cross-appealed from the finding of his contributory negligence. Contributory negligence is not an absolute defense under maritime law, but rather it is a basis to apportion damage. The trial court found appellee contributorily negligent in the amount of 50 per cent because he failed to request additional help; we are bound by this finding unless it is "clearly erroneous." American President Lines, Ltd. v. Redfern, supra.

Appellee's superior officer was in the engine room while appellee repaired the lube pump. He had authority to assign an extra man to help in the repair if requested. In our opinion it was not clearly erroneous to hold that a reasonable man would have asked for help and the fact that appellee did not ask for help contributed to his resulting injury.

Judgment affirmed.

[Title of Court and Cause]

JUDGMENT OF COURT OF APPEALS

Appeal from the United States District Court
for the Northern District of California,
Southern Division

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 21, 1967.

United States Court of Appeals for the Ninth Circuit

(Excerpt from Proceedings of Friday, May 26, 1967)

Before: Hamley, Hamlin and Duniway,
Circuit Judges

ORDER DENYING PETITIONS FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered, that the petition of the appellant and Cross-Appellee American President Lines, Ltd., filed on May 19, 1967, and the petition of the appellee and Cross-Appellant E. B. Welch, filed on May 19, 1967, and within time allowed therefor by rule of Court, for a rehearing of the above cause be, and hereby are denied.

Appendix C

FROM BRIEF FOR APPELLEE AND CROSS-APPELLANT (pp. 29-31):

A. There Is No Evidence in the Record That Additional Help Was Available at Hand. There Is a Failure of Proof by the Shipowner on This Issue.

The finding that appellee was guilty of contributory negligence because he failed to request another assistant when the initial helper left before the job was completed, must have as its evidentiary premise, that a substitute or other help was available at that time. The record, however, contains no such factual support. Indeed, there is substantial evidence to the contrary; that no additional available help was at hand. Furthermore, the shipowner had the burden of proof on this issue.

Mr. Goodheim, who was the engineer on watch in the forward engine room and who was appellee's immediate superior described the situation on the early afternoon of February 19, 1964 in the following words:

> "Q. To your knowledge where were the other engineers and the other members of the unlicensed personnel (that is the black gang) at the time that Mr. Welch was carrying or transporting this particular crosshead up to the machine shop?
>
> A. In the other engine room working on the boilers.
>
> Q. To your knowledge what was the matter or condition of the boilers in the after engine room of the ship?

A. I believe they were leaking.

Q. Was that the situation in the early afternoon of February 19, 1964?

A. Yes sir.

Q. Was there any extra help available to Mr. Welch at the time that he, as you saw, carried this crosshead from the lower flat up to the machine shop?

A. No sir.

Q. Where was the First Assistant Engineer, to your knowledge?

A. Back with the boilers, with the rest of the crew." (Goodheim, 7-8).

Moreover, the engine storekeeper who had authority to call out wipers (maintenance men) as helpers was not in his office, the door to which was padlocked at the time (R. II, 69). Mr. Pak, the First Assistant, who had primary authority to assign unlicensed personnel, was busy in the after engine room (Pak 10). Although Mr. Pak indicates it was his practice to assign men if requested, he fails to indicate whether a man was in fact available on that occasion (See Pak 10, 25-26). And appellee, himself, testified that he did not ask for help because "there was no one around." (R. II, 68).

The District Court is not permitted to base its finding of contributory negligence on conjecture concerning availability of crew members for assignment to aid Mr. Welch in the required task. This is especially true where all the evidence and all reasonable inferences from the evidence point to the opposite conclusion.

FROM CROSS-APPELLANT'S REPLY BRIEF (pp. 2-5):

2. The Record in This Case—Failure of Proof on the Contributory Fault Issue.

Cross-Appellee, in its Answering Brief, has failed to cite *any* evidence contained in the record which demonstrates that a "safe alternative (assistance)" *was available* to Mr. Welch on the afternoon of February 19, 1964. Instead, the shipowner seeks to construct a theory based on pure speculation which it characterizes as "circumstantial evidence" to remedy this deficiency in proof. It argues that (1) ". . . it was Pak's practice and responsibility to assign men to assist others when requested"; and (2) "members of the crew were working nearby". (Cross-Appellee's Answering Brief, p. 10.) Thus, the shipowner's argument goes, someone, somewhere, would have been assigned, had a request been made. Such argument is specious and unsound. The invalidity and speculative nature of the shipowner's position is in fact revealed by Cross-Appellee's own statement that "testimony concerning *which* man was available for such task would be too 'speculative' ". (Cross-Appellee's Answering Brief, p. 10.)

The reason that Cross-Appellee does not desire to dwell on the question of who, if anyone, would have been assigned to help Mr. Welch is that the record affirmatively shows there in fact was no one available for such assignment at the time. Although Cross-Appellant did not have the burden of coming forth or going forward with proof that help was unavailable, the only evidence in the record supports this view.

While Mr. Pak, the First Assistant Engineer, did testify that *normally* "he could supply help on request" he also affirmed that ". . . the situation wasn't normal. We had a lot of repairs going on." (Pak, 33.) Mr. Goodheim, the Second Assistant Engineer, who was Mr. Welch's immediate supervisor, testified as follows:

"Q. Did you have any supervisorial duties over Mr. Welch in connection with his repair to this pump that he was working on?

A. Yes.

Q. What were your duties?

A. I was in charge of the work in the forward engine room.

Q. Well, were you in charge of the repair which he was doing, or was he in charge of it, or were you both in charge of it? Please explain the relation to me.

A. As senior engineer I was the man that was responsible.

Q. Did you instruct him to do this job?

A. Yes.

Q. Did you assign any help to him?

A. Yes.

Q. How much help did you assign to him?

A. I think he had one man with him in the morning, *as long as it was possible to keep him on the job with him.*

Q. Was there more than one man assigned to work with Mr. Welch?

A. I believe there was a wiper and a maintenance man, originally.

Q. Do you recall their names?

A. No I don't.

Mr. Jarvis: You are talking about the morning of the same day.

The Witness: The morning.

Mr. Jarvis: Up until noon.

The Witness: At the starting of the job.

Q. (By Mr. Wentker) Is it your testimony that sometime during the day these two men, or one man, whatever the case may have been, were taken away from that job?

A. Yes sir.

Q. Did you see them taken away?

A. They were taken away on the First Assistant's orders.

Q. That, you believe, is Mr. Smith?

A. Yes.

Q. Did anybody come and tell you that these men were to be taken away?

A. I believe one of the other Seconds informed me that all men were going to the after engine room on the boilers." (Goodheim, 25-26.) (Emphasis added)

Thus, during the entire afternoon up to and including the time of injury, all of the evidence in the record indicates that the vessel's engine room was plagued with many problems. Both Welch and Goodheim were without assistance, and the men who had been assigned to the forward engine room that morning had been sent into the after engine room to work on the leaky boilers. It was, as Mr. Pak testified, an "abnormal situation". If there are any inferences to be drawn from the evidence in the record, it is certainly not that a man would have been assigned if requested. It is rather clear, without inference, that

there was no one available at the time to assist Mr. Welch, and it was necessary for him to finish the assigned task with whatever means he had at hand.

FROM CROSS-APPELLANT'S PETITION FOR REHEARING (pp. 1-2):

Cross-Appellant, E. B. Welch, hereby petitions for a rehearing on his Cross-Appeal, respectfully requesting this Court to reconsider that portion of the decision and judgment entered on April 21, 1967 in this action regarding the issue of contributory negligence, on the following grounds:

1. Prejudicial omission of a material fact: The record below shows without conflict that no help or helpers (men) were in fact available to aid Cross-Appellant, had he requested help in connection with the assigned task (Goodheim, 7-8; 25-26; R. II, 69; R. II, 68; Pak 10, 25-26, 33).[1] The Court of Appeals omitted this material fact from its opinion; had the Court of Appeals considered this undisputed fact, the finding of the District Judge must be reversed on the issue of contributory negligence as clearly erroneous, because Cross-Appellant's failure to request help, *where no help was in fact available,* could not then have contributed to the occurrence of the accident as a matter of law.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 532

E. B. WELCH,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The only questions actually presented by this record are:

1. Whether it was error for the Court of Appeals to have lacked a definite and firm conviction that the District Court was wrong in finding contributory negligence

and for the Court of Appeals to refuse accordingly to set aside the finding as clearly erroneous.[1]

2. Whether the well-settled rule that the doctrine of comparative negligence applies to maritime injury claims, when they are founded upon unseaworthiness as well as when they are founded upon negligence, should be overturned.

STATEMENT

Petitioner, an experienced officer holding a Chief Engineer's License (R. II, 65) and serving on this occasion as Third Assistant Engineer on the SS PRESIDENT ROOSEVELT, was instructed by the First Assistant Engineer to dismantle a pump which was not functioning properly and make such repairs as were necessary (R. II, 65). Petitioner testified that what he was told was: "Take the pump apart, disassemble it and find out what is wrong and fix it." (R. II, 56). It was not considered at the time that the crosshead would have to be carried anywhere (R. II, 92).

In the course of making the repairs it proved necessary to carry certain parts to the machine shop (R. II, 64). The District Court found that Petitioner injured his back as a result of carrying the 42-pound crosshead from the pump to the machine shop and held the vessel liable for unseaworthiness (Findings 7 and 8, R. II, 67).

Evidence showed that, at the time of the accident, there were several other men working in the engine rooms, in-

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[1]Findings are to be set aside as clearly erroneous only when the Court of Appeals has the "definite and firm conviction that a mistake has been committed". *United States v. Oregon State Medical Society*, 343 U.S. 326, 339 (1952).

cluding the First Assistant Engineer himself (R. II, 68; Exhibit: Pak Deposition, 14-15; Exhibit: Goodheim Deposition, 4). Petitioner testified, however, that he did not ask the First Assistant for help (R. II, 68) nor look for the First Assistant (R. II, 68) nor otherwise look around the engine rooms for any additional help nor ask such help from the engine storekeeper, who had authority to provide it (R. II, 69). It was the uncontradicted evidence of the First Assistant Engineer that it was his custom and practice to assign such help when requested (Exhibit: Pak Deposition, 32, 34).

The District Court found that Petitioner's injury was caused, to the extent of 50%, by his own negligence in failing to seek assistance (Finding 20, R. II, 67) and reduced his award by 50% accordingly (Finding 21, R. II, 67-68). The Court of Appeals examined and affirmed these findings.

Petitioner's statement that "no help or assistance was available to aid petitioner had he requested help in connection with the assigned task" is not supported by the record. Petitioner fails also to point out the correctness of the determination by both lower Courts that the Petitioner, an experienced and responsible officer, had failed to request any additional help in any event.

ARGUMENT

1. WHAT PETITIONER SEEKS IS A RE-EVALUATION OF FACTS, WHICH IS NOT THIS COURT'S FUNCTION

Petitioner's stated grounds for seeking certiorari are alleged conflicts between the decision here and the de-

cisions of other Courts. As we show below, the cases relied upon by Petitioner involve no conflicts at all. Throughout the argument runs the attempt to secure a re-evaluation of the evidence in this case, as it bears upon the District Court's finding of contributory negligence for failure of this experienced officer to seek additional help when help was claimed by him to have been needed.

Petitioner asserts that no help was available. By this he refers to evidence showing simply that no one was standing idle waiting to be called upon and that other men were engaged in various jobs to which they had been assigned. From this the Courts below were asked to believe that no other crewman could have been reassigned temporarily to assist Petitioner if his need for assistance had been brought to anyone's attention. The uncontradicted evidence was that it was the usual and customary practice of the First Assistant Engineer, the responsible officer, to assign such help when requested (Exhibit: Pak Deposition, 32, 34). No evidence going beyond such practice was required or proper, since the failure of Petitioner to make a request left any charge that the request would not have been complied with in the realm of mere inadmissible speculation.

The finding of negligence is a finding of fact. *Pacific Tow Boat Co. v. States Marine Corp.*, 276 F.2d 745, 752, 1960 A.M.C. 696, 705 (9th Cir. 1960.) The question was evaluated by the District Court against the background of all the evidence in this case. The finding was challenged, re-evaluated and upheld in the Court of Appeals. It is the settled doctrine of this Court, that, absent extraordinary circumstances, this Court will not review con-

current findings of fact of two lower Courts. *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 98-99, 1944 A.M.C. 1, 3 (1944), and cases there cited. No such extraordinary circumstances are presented here.

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2. NO QUESTION OF FEDERAL LAW IS PRESENTED WHICH HAS NOT BEEN SETTLED BY THIS COURT

Along with Petitioner's challenge to the lower Court's findings of fact there also appears, under the heading of alleged conflicts with the decisions of other courts of appeals, an argument for the adoption by this Court of a new rule not followed by any of these courts. Petitioner proposes, as though it were an unsettled matter in this Court, that this Court adopt a rule that the negligence of the seaman is without effect upon his claim so far as the claim is based upon unseaworthiness. The contention now urged was neither presented to nor decided by the Court below. Petitioner relies for this position upon certain non-maritime products liability cases.

Whether or not Petitioner reads the non-maritime, state-law products liability cases correctly, the law applicable to the present case has long been settled by this Court. In *Socony-Vacuum Oil Company v. Smith*, 305 U.S. 424, 1939 A.M.C. 1 (1939), this Court, dealing with a seaman's Jones Act negligence claim in which assumption of risk was urged as a defense, ruled that assumption of risk would not bar the claim but must be considered as negligence operating under the established Admiralty doctrine of comparative negligence to reduce the damages. The discussion of the Court there should

leave little doubt that the same rule of comparative negligence applied to the seaman's single cause of action when urged by him upon the alternative ground of unseaworthiness. Indeed, it is difficult to see how two different contributory negligence rules can be simultaneously applied to the same cause of action.[2]

In *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 1954 A.M.C. 1 (1953), this Court held that the maritime comparative negligence rule applied to a longshoreman's cause of action against the shipowner founded upon allegations of both negligence and unseaworthiness, citing *Socony Vacuum Oil Company v. Smith, supra.* In *Palermo v. Luckenbach Steamship Company, Inc.,* 355 U.S. 20, 1957 A.M.C. 2275 (1957), this Court again held, in a longshoreman's action for negligence and unseaworthiness, that the longshoreman's own negligence, if any, was to be considered in mitigation of damages, again citing the *Socony-Vacuum* case. In *United New York and New Jersey Sandy Hook Pilots Association v. Halecki,* 358 U.S. 613, 1959 A.M.C. 588 (1959), this Court agreed with the adoption, under State law, of the Admiralty rule of comparative negligence in a death claim founded upon unseaworthiness.

It can hardly be said, therefore, that the rule is unsettled. And it is difficult to imagine an argument for

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[2]Although the seaman's claim is founded upon the distinct grounds of negligence and unseaworthiness, it constitutes but a single cause of action. *Baltimore Steamship Company v. Phillips,* 274 U.S. 316, 1927 A.M.C. 946 (1927). Accordingly, *e.g.,* inconsistent doctrines of laches and limitations cannot be permitted to operate upon the two grounds since the whole cause of action would be affected by the more restrictive doctrine. *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221, 1958 A.M.C. 1754 (1958).

importing into the maritime law from State law a doctrine calculated to produce the utmost disorder by treating contributory negligence simultaneously in different ways in a seaman's single cause of action founded upon negligence and unseaworthiness.

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3. NO CONFLICT WITH THIS COURT OR ANOTHER COURT OF APPEALS IS PRESENTED

Petitioner urges the existence of a conflict with six other decisions of courts of appeals and one decision of this Court. The decision of this Court[3] and two of the courts of appeals' decisions[4] had nothing to do with the issue of contributory negligence. One of the courts of appeals decisions concerning maritime injuries involves inadequate jury instructions on the nature of the seaman's calling, as a background for the determination of contributory negligence[5] and one simply involves a finding of non-negligence in different circumstances than those presented here, rather than the application of any different rule of comparative negligence.[6] The remaining two cases[7] concern doctrines of State law rather than the maritime law involved in this case.

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[3] *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 1960 A.M.C. 2251 (1960).

[4] *Ballwanz v. Isthmian Lines, Inc.*, 319 F.2d 457, 1964 A.M.C. 1480 (4th Cir. 1963); *Sizemore v. United States Lines Co.*, 323 F.2d 774, 1964 A.M.C. 1950 (3rd Cir. 1963).

[5] *Cox v. Esso Shipping Company*, 247 F.2d 629, 1957 A.M.C. 1927 (5th Cir. 1957).

[6] *Smith v. United States*, 336 F.2d 165, 1965 A.M.C. 153 (4th Cir. 1964).

[7] *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3rd Cir. 1965); *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963).

Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 1960 A.M.C. 2251 (1960) did not concern the issue of the seaman's own negligence involved in the present case. The *Michalic* case concerned only the existence of a *prima facie* case of negligence and unseaworthiness entitling the seaman to have his claim presented to the jury, where the Court of Appeals had affirmed the District Court's grant of a directed verdict for the shipowner.

In *Cox v. Esso Shipping Company*, 247 F.2d 629, 1957 A.M.C. 1927 (5th Cir. 1957), the Court did not rule out contributory negligence of the seaman, but, on the contrary, affirmed that the jury, in evaluating the contributory negligence, was to determine "[w]hat a reasonably prudent seaman would or would not have done" (247 F.2d at 635, 1957 A.M.C. at 1937) and held that this question was submitted to the jury upon inadequate instructions as to the circumstances and nature of the unlicensed seaman's calling.

Ballwanz v. Isthmian Lines, Inc., 319 F.2d 457, 1964 A.M.C. 1480 (4th Cir. 1963), was a longshoreman's case in which the jury found 50% contributory negligence of the plaintiff and a defense judgment was entered upon the basis of confusing answers by the jury to special interrogatories. The finding of 50% contributory negligence was not in issue on appeal and was not criticized by the Appellate Court. The instruction concerning failure to request help which was disapproved by the Court of Appeals did not have to do with contributory negligence, as Petitioner urges, but was erroneous because it advised the jury that they might take plaintiff's

failure to complain into account in determining the basic question whether there was unseaworthiness.

Smith v. United States, 336 F.2d 165, 1965 A.M.C. 153 (4th Cir. 1964) was a case of injury to a non-supervisory longshoreman who was found contributorily negligent for climbing out of the hold in which he had been working all day by means of a ladder which had an observable defect in design and construction in that the toe clearance on certain rungs was less than that which is standard in the industry. Unseaworthiness based on the design and construction of the vessel was not in issue on the appeal, which challenged only the finding of contributory negligence. The Court of Appeals held the finding of contributory negligence improper in the circumstances since no alternative route was shown for the man to get out of the hold. The case turns on its peculiar facts, not the least of which is that the problem arose from the design and construction of a vessel, which a longshoreman would scarcely think it worthwhile to complain about or ask to have changed.

Sizemore v. United States Lines Co., 323 F.2d 774, 1964 A.M.C. 1950 (3rd Cir. 1963) does not concern contributory negligence in any way, as no contributory negligence was found by the jury and the appeal by the plaintiff longshoreman concerned only what he considered to be an inadequate judgment brought about by failure of the Court to give adequate instructions upon the issue of permanent injury and continuing disability. The Court of Appeals' Opinion took no note of the issues in the District Court which had not been brought before the Court on appeal.

Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3rd Cir. 1965) and *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963), the remaining two cases which Petitioner urges to be in conflict, deal only with the non-maritime State laws of Pennsylvania and Florida, respectively, and obviously, therefore, do not involve any possible conflict with a decision under the Jones Act and general maritime law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated, San Francisco, California,
September 18, 1967.

Respectfully submitted,
GRAYDON S. STARING,
Attorney for Respondent.

FREDERICK W. WENTKER, JR.,
LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
Of Counsel.

SUPREME COURT, U. S.

NOV 1 1967

JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 532

E. B. WELCH,

Petitioner,

v.

AMERICAN PRESIDENT LINES, LTD.,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

American Trial Lawyers Association
Admiralty Section

By: Paul S. Edelman

PAUL S. EDELMAN,
99 Park Avenue,
New York, New York.

On Petition and Brief.

Supreme Court of the United States

No. 532

E. B. WELCH,

Petitioner,

v.

AMERICAN PRESIDENT LINES, LTD.,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The American Trial Lawyers Association, *Amicus Curiae* respectfully moves for leave to file the annexed brief in favor of Petitioner, and to extend the time for filing therefor. An affidavit in support of this motion is attached hereto.

PAUL S. EDELMAN,
for the American
Trial Lawyers Association.

Affidavit of Paul S. Edelman.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

PAUL S. EDELMAN, being duly sworn deposes and says, in support of the motion of the American Trial Lawyers Association to file a brief, *Amicus Curiae,* and to extend the time for filing therefor:

I am an attorney admitted to this Court, designated by the American Trial Lawyers Association to file papers as *Amicus Curiae* in support of the position of the Petitioner herein.

The Statement of Interest of the American Trial Lawyers Association; Statement of the Case and Brief have already been served on the parties and filed with the Court.

Delay in filing the Petition and Brief was unfortunately occasioned by difficulties in communication among members of the Admiralty Committee and lack of precise knowledge as to when the Petition for Certiorari was in fact to be filed. The ultimate responsibility was of course mine as the attorney designated to state the position of the Association, and as such I express my regrets to the Court.

As stated, the Association is very much concerned that a crew member under the decision of the Court below, may be required to have his damages substantially reduced when he is acting in compliance with a direct order which he must follow under shipboard rules of discipline.

Consent of the Respondent has unfortunately not been given to the Association to file a brief *Amicus Curiae,* but the consent of the Petitioner has been given.

WHEREFORE, it is respectfully requested that permission be given to the American Trial Lawyers Association to file a brief *Amicus Curiae* and that the time to file same be extended.

PAUL S. EDELMAN.

Sworn to this 31st day of
October, 1967.

Certificate.

This is to certify that on the 31st day of October, 1967, copies of the above notice of motion and affidavit have been forwarded to:

Graydon S. Staring, attorney for respondent, at his office at 311 California Street, San Francisco, California 94101;

Lillick, McHose, Wheat, Adams & Charles, counsel for respondent, at their offices at 311 California Street, San Francisco, California 94101; and to

Jarvis, Miller & Stender, attorneys for petitioner, at their offices at 123 Second Street, San Francisco, California 94105.

PAUL S. EDELMAN.

SUPREME COURT, U. S.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 532

Office-Supreme Court, U.S.
FILED
NOV 1 1967
JOHN F. DAVIS, CLERK

E. B. WILCOX,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Respondent.

OBJECTION TO AMICUS CURIAE PETITION AND BRIEF OF AMERICAN TRIAL LAWYERS ASSOCIATION ADMIRALTY SECTION

GRAYDON S. STANDING,
311 California Street,
San Francisco, California 94104,
Attorney for Respondent.

FREDERICK W. WHITTIER, JR.,
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San Francisco, California 94104,
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 532

E. B. WELCH,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Respondent.

OBJECTION TO AMICUS CURIAE PETITION AND BRIEF OF AMERICAN TRIAL LAWYERS ASSOCIATION ADMIRALTY SECTION

Respondent American President Lines, Ltd. objects to the American Trial Lawyers Association Admiralty Section's *Amicus Curiae* Petition and Brief in favor of Petitioner as follows:

1. REQUEST FOR CONSENT

Rules 42(1) and (3) of this Court make it clear that a motion for leave to file a brief *amicus curiae* is in order

only after refusal of a party to consent to the filing of such a brief. Although the *Amicus Curiae* Petition contains no allegation that consent was requested, it appears that Martin J. Jarvis, Esq., attorney for Petitioner E. B. Welch himself, on August 22 or 23, 1967, about the time the Petition for Certiorari was filed, inquired, in a telephone conversation with Frederick W. Wentker, Jr., of Counsel for Respondent, for consent to the filing of a brief on behalf of the American Trial Lawyers Association in support of the Petition and was advised that consent would not be granted, since it appeared that there was no reason for permitting Petitioner's attorney and his colleagues similarly situated to file a brief, using the *amicus curiae* device, in avoidance of the rule prohibiting Petitioner's attorney, acting alone, from filing such a brief in support of the Petition.

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2. UNTIMELINESS

Rule 24(3) of this Court provides that the petition, the record and brief be distributed to the Court for its consideration upon the expiration of the period for filing the Respondent's brief. Rule 42(1) provides that a motion for leave to file an *amicus curiae* brief when consent is refused may be filed only if submitted a reasonable time prior to the consideration of the petition. Rule 42(3) provides only for such motions as are "timely".

The period for filing the Respondent's brief in this matter expired September 22, 1967, and the present *Amicus Curiae* Petition was dated at New York October 25, 1967, and received by Respondent's attorney October 27,

1967. The filing and service are untimely and unreasonable. If the Brief of *Amicus Curiae* set forth facts or questions of law which had not been adequately presented by the parties, or any other new matters worthy of the Court's consideration, the lateness of the motion would leave Respondent with inadequate time to consider such matters and respond to them.

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3. INADEQUACY OF INTEREST

It is to be noted that the application does not come from any of the labor unions who diligently represent the interests of American seamen. The statement of interest of the American Trial Lawyers Association Admiralty Section shows only that it is an association of lawyers situated similarly to the attorney for the petitioner in this proceeding, presumably himself a member of that Association. The interest of the Association is set forth with something less than candor. It is general knowledge that the attorneys in cases of this sort are engaged upon contingent fee contracts and that their fees are therefore directly proportional to the amounts of the awards. The immediate interest of the attorneys comprising the Association is therefore an interest in larger fees, which differs not at all from the interest any litigant has in securing a larger award. Such an interest, however cloaked in unctuous expressions of concern for others, is not an appropriate basis for intervention as *amicus curiae*. It may be added that the statement of the size of the interested class for whom the Association purports to speak is a gross and patent exaggeration.

4. ADEQUACY OF PRESENTATION OF FACTS AND QUESTIONS OF LAW

Rule 42(3) of this Court requires the motion to "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties". The *Amicus Curiae* Petition does not set forth any such facts or questions of law nor assert that they have not been or may not be adequately presented by the attorney for the Petitioner. Reference to the proposed Brief of *Amicus Curiae* confirms that there are no such facts or questions. In the proposed Brief the Petitioner's statement of the case is adopted by reference. As to questions of law, the proposed Brief presents two, which are simply a re-ordering and re-phrasing of the three questions presented in the Petition.

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5. PRELIMINARY COMMENTS ON THE PROPOSED BRIEF OF AMICUS CURIAE

Upon a cursory review in the time available, the proposed Brief of *Amicus Curiae* appears to present nothing new bearing on the questions before the Court.

No new light whatever appears to be shed upon the fact question involved in the finding of contributory negligence.

With respect to the Petitioner's contention that the rule of comparative negligence should be abandoned in connection with the unseaworthiness ground of the seaman's cause of action for personal injury, the proposed Brief appears to reiterate in various ways the unintelligible argument that, while a shipowner at fault may have a re-

duction of damages on account of the negligence of the injured man, a shipowner held on the basis of unseaworthiness without fault should have his sins brought sharply home to him by the denial of such a reduction.

In support of this view the proposed Brief appears to rely principally upon the same maritime cases as the Petition, adding, however, an unwarranted argument from *Waldron v. Moore-McCormack Lines,* 386 U.S. 724, 1967 A.M.C. 579 (1967). In *Waldron* this Court had before it the question of the existence of a basis for the finding of unseaworthiness, rather than any question of a change in the effect of contributory negligence. If an attempt is now being made to draw a distinction between unseaworthiness based on inadequate crew, as in *Waldron,* and unseaworthiness in other respects, it is refuted in advance by the *Waldron* case, which denies any justification "for drawing a distinction between the ship's equipment, on the one hand, and its personnel, on the other" (386 U.S. at 726, 1967 A.M.C. at 581).

In short, it appears that the Brief of *Amicus Curiae* which is sought to be filed at this very late date is simply an attempt of colleagues of Petitioner's attorney to have the last word by a device not available to the Petitioner directly.

6. CONCLUSION

For the foregoing reasons and because "such motions are not favored" (Rule 42) it is respectfully submitted that the *Amicus Curiae* Petition of the American Trial Lawyers Association Admiralty Section should be denied.

Dated, San Francisco, California,
October 30, 1967.

Respectfully submitted,
GRAYDON S. STARING,
Attorney for Respondent.

FREDERICK W. WENTKER, JR.,
LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
Of Counsel.